Docket No. 7504.

United States
Circuit Court of Appeals
For the Ninth Circuit.

L. H. Wolf,
Petitioner,

vs.

Commissioner of Internal Revenue,
Respondent.

BRIEF FOR PETITIONER.

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PRELIMINARY STATEMENT.

This case comes before the Court on a petition for a writ of review of a decision and order of the United States Board of Tax Appeals determining a deficiency in the Federal income tax of Petitioner for the year 1929 in the amount of $1,249.44. The Board's order was entered on January 11, 1934.

QUESTIONS INVOLVED.

1. Did Petitioner have a closed transaction in which gain was realized when a street was cut through his property and his portion of the cost of the improvement exceeded the award for the land taken, and both the assessment and the award were authorized by the same Statute and he did not otherwise dispose of his property?

2. If a closed transaction resulted from the condemnation of the right of way for the street, is the Petitioner entitled to add to the cost of the property condemned, a part of the improvement assessment which was paid?

3. If a profit was realized from this transaction, then do the non-recognizing provisions of *Section* 112(f) of the Revenue Act of 1928 apply?

STATEMENT.

The facts are not in dispute. Nearly all the facts were stipulated. Additional evidence was uncontradicted.

In 1920, Petitioner acquired a parcel of property located in Hollywood, California. The cost of such property was Twenty-one Thousand Dollars ($21,000.00). [Tr. pp. 30-31.] The property was 103 feet wide, fronting on Cahuenga avenue and 383 feet deep. [Tr. p. 31.]

Between 1920 and 1925, Petitioner constructed various buildings on the property at a cost of $75,000.00. [Tr. p. 41.] The buildings covered the entire lot, except for a driveway through the property. A two-story brick building stood on the front portion of the lot. The second

story was built over the driveway. A smaller frame and stucco building was on the rear of the lot. [Tr. p. 31.]

In 1929, the City of Los Angeles, for the purpose of opening up Ivar avenue, a public thoroughfare, condemned a strip 70 feet wide running diagonally across the approximate center of Petitioner's land. This strip represented 20 per cent of the total area of Petitioner's property. By Ordinances No. 53214 (approved November 10, 1925), and No. 54065 (approved February 24, 1926), the City of Los Angeles created a special improvement district and the condemnation proceedings and improvements herein referred to, were made pursuant thereto. [Tr. p. 31.] These proceedings were taken under the provisions of the Street Opening Act of 1903.

By order of Court, Petitioner was awarded the following amounts:

(1) Award for buildings taken	$10,267.00
(2) Award for the land taken	23,549.00
(3) Award for severance damages for the balance of land not taken	4,006.00
Total	$37,822.00

[Tr. pp. 31-32.]

The City of Los Angeles levied special assessments for opening and widening work on the newly created street adjacent to parcels of Petitioner's property in the amounts

of $19,470.32 and $19,243.28, respectively, totaling $38,-713.60. [Tr. p. 32.]

Petitioner in 1929 paid the special assessments amounting to $38,713.60, by applying the awards amounting to $37,822.00, against assessments and paying the balance of $891.60 in cash. [Tr. p. 32.]

In 1931, the City of Los Angeles levied, and the Petitioner paid further special assesments on the two newly created parcels of $1,317.20, and $1,315.55 for the paving, sidewalks, storm drain, etc., along Ivar avenue, occasioned by the opening of said avenue in 1929. [Tr. p. 32.]

In 1929, Petitioner paid $1,000.00 attorney's fees in connection with the said awards and special assessments. [Tr. p. 33.]

It was determined by the Respondent that the Petitioner derived taxable income of $18,349.00 on the payment made for the land computed as follows:

Award received for portion condemned	$23,549.00
Cost of portion condemned	4,200.00
Difference	$19,349.00
Less attorney's fees	1,000.00
Taxable gain	$18,349.00

[Tr. p. 33.]

No part of the special assessments were included in the cost of $4,200.00.

In respect of the buildings the Petitioner sustained neither gain nor loss. [Tr. p. 33.]

Petitioner did not sell, exchange or otherwise dispose of the above described property, in 1929, except as stated above. [Tr. p. 33.]

The Petitioner expended in 1929 and 1930, $6,809.98 in the necessary demolition, alteration and refacing of buildings standing on the property involved in this proceeding. The $10,267.00 mentioned in the written stipullation, as being for buildings taken, was among other things, intended to cover this work. [Tr. pp. 39-40.]

The portion (rear) of Petitioner's property affected by the opening of Ivar avenue was, both before and after the said opening, in a light manufacturing district. The community has not been improved or built up since the opening of Ivar avenue. [Tr. p. 41.]

Petitioner did not vote or petition for the creation of the special assessment district which was the basis for the opening of Ivar avenue through his property. [Tr. p. 41.]

Twenty per cent of the 1929 special assessment (applicable to the strip which represented 20 per cent of the land) was $7,742.72. [Tr. par. IV, p. 31, par. VI, p. 32.]

SPECIFICATION OF ERRORS RELIED ON.

1. The Board of Tax Appeals erred as a matter of law in ordering and deciding that there was a deficiency for the year 1929.

2. The Board of Tax Appeals erred as a matter of law in deciding that Petitioner realized any taxable income in 1929 arising out of the involuntary condemnation of his property.

3. The Board of Tax Appeals erred in deciding that there was a closed transaction in 1929.

4. The Board of Tax Appeals erred in finding that Petitioner derived cash or anything else from his property in 1929, as a result of its involuntary conversion.

5. The Board of Tax Appeals erred in failing to find that Petitioner's property was involuntarily converted into other property similar or related in service or use to the property so converted.

6. The Board of Tax Appeals erred in failing to find that Petitioner reinvested the proceeds of the involuntary conversion of his property in the acquisition of other property similar or related in service or use to the property so converted.

7. The Board of Tax Appeals erred in failing to find that the rental value of Petitioner's property was decreased by the transaction involved.

8. The Board of Tax Appeals erred in failing to find that the character of Petitioner's property was not im-

proved by the opening of Ivar avenue through Petitioner's property.

9. The Board of Tax Appeals erred in failing to find that the sidewalk on Ivar avenue was graded and paved about two feet below the level of the floors in Petitioner's buildings.

10. The Board of Tax Appeals erred in its decision and determination of a deficiency of $1,249.44 for the taxable year 1929.

11. The Board erred in rendering decision for the Respondent. [Tr. pp. 27-28.]

STATUTES INVOLVED.

Section 112 (f), Revenue Act of 1928, provides:

> "Involuntary conversions.—If property (as a result of its destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation, or the threat or imminence thereof) is compulsorily or involuntarily converted into property similar or related in service or use to the property so converted, or into money which is forthwith in good faith, under regulations prescribed by the Commissioner with the approval of the Secretary, expended in the acquisition of other property similar or related in service or use to the property so converted, or in the acquisition of control of a corporation owning such other property, or in the establishment of a replacement fund, no gain or loss shall be

recognized. If any part of the money is not so expended, the gain, if any, shall be recognized, but in an amount not in excess of the money which is not so expended."

Section 113 (a) of the Revenue Act of 1928 provides:

"Property acquired after February 28, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; . . ."

Pertinent sections of the *Street Opening Act of 1903* are set out in the appendix. The substance of the sections of the *Street Opening Act of 1903,* bearing on this case, is as follows:

The Act provides for the bringing of a suit to condemn property for public improvements; for the entry of an interlocutory decree fixing the amount of the awards for the property taken or damaged; for the assessment by the Street Commissioner against properties benefited in the amount necessary to pay the awards and the cost of the work. The Act provides that after the assessments are collected and the awards paid therefrom, a final judgment will be entered directing that the interlocutory decree be satisfied, and condemning the lands described in the complaint. The Act provides that the property owner may, at his request, have the award offset against the assessment.

ARGUMENT.

I.

Petitioner Did Not Have a Closed Transaction and Did Not Derive a Profit When the City of Los Angeles Involuntarily Took a Strip of His Property and Required Him to Pay an Assessment Greater by $15,164.60 Than the Award for the Land Taken.

This was not a simple case in which land which cost $4,200 was sold for $23,549, because the city, after acquiring the land, had the right to and did charge the Petitioner's land for opening and widening work, in the sum of $38,713.60. The net result was an out-go, and it was impossible for Petitioner to get the $23,549.00 from the city without paying the $38,713.60 to the city, for work on its newly acquired street. It is one thing if the owner of property is able to sell it for $23,549.00 without any obligation on his part to spend money for improvements on the property sold, and quite another thing if he has to spend money improving the property *after he has disposed of it.* To say that the income-result is the same in these two utterly different situations is to violate common sense.

In this case it was absolutely impossible for him to get the $23,549 without expending a larger amount for improvements on the land which he was disposing of.

If a taxpayer cannot sell his property without promising to build a house on it for the purchaser, clearly the cost of building the house must be taken into account before we determine what the gain or loss is, if any, to the seller. While the transaction in the present case is a compulsory transaction, it still remains true that the only

reason for the condemnation was the *bona fide* intention of the city to open an improved street—the very circumstance out of which Petitioner's cross-liability arose.

Relatively early in the administration of tax law, a difference was recognized between (1) a disposition of property without any further obligation on the part of the seller and (2) a disposition in which the disposer is encumbered with an unconditional obligation to spend money. Thus, when a developer of real estate sold lots before development was completed, covenanting that streets, sewers, shade trees, etc., should in due time be installed by the seller, the Bureau of Internal Revenue held that in determining gain or loss the estimated cost of the improvements should be taken into account. C. B. 1, p. 76, O. D. 226; C. B. 3, p. 108, O. D. 567. See also *Milton A. Mackay,* 11 B. T. A. 569, 573, and *Birdneck Realty Corporation,* 25 B. T. A. 1084.

Thus, during the period when there was no express provision in the tax law on this subject, the adjustment was made by adding to the original cost the estimated cost of the improvements which were to be made at the seller's expense though for the benefit of the property he was disposing of. Thus the latter of the above cited rulings (C. B. 3, p. 108, O. D. 567) provides:

> "Profit realized on the sale of lots, the selling price of which includes the cost of certain development work already made or to be made in accordance with the contract of sale, should be based on the cost of the land to the vendor, or its fair market value as of March 1, 1913, if acquired prior to that date, plus the actual and estimated future expenditures for development."

At length, in the Revenue Act of 1926, there was inserted in the law a specific provision (Section 214 (a) (11)):

> "In the case of a casual sale or other casual disposition of real property, a reasonable allowance for future expense liabilities, incurred under the provisions of the contract under which such sale or other disposition was made, under such regulations as the Commissioner, with the approval of the Secretary, may prescribe, including the giving of a bond, with such sureties and in such sum (not less than the estimated tax liability computed without the benefit of this paragraph) as the Commissioner may require, conditioned upon the payment (notwithstanding any statute of limitations) of the tax, computed without the benefit of this paragraph, in respect of any amounts allowed as a deduction under this paragraph and not actually expended in carrying out the provisions of such contract."

This provision has been repeated in subsequent Revenue Acts. It is referred to here not because Petitioner claims to come expressly within its terms, but because it is illustrative of a broader principle fully recognized before 1926, when this express provision was first enacted, and still in effect.

It does not seem possible that Petitioner could have realized a taxable profit when forced to pay $15,164.60 to have a street cut through his property, yet that is all that in substance occurred in this case.

The fact that the Petitioner had the street forced upon him, is not important in deciding whether there was income or not. Le us suppose that the Petitioner had built

the street in order to enhance the value of his property, and had dedicated the street to public use. Plainly, in such a case, no profit would be realized and the transaction would be regarded as in the nature of a capital expenditure for permanent improvements, which would affect gain or loss only when the owner sold the rest of his property out of which the highway had been carved.

To differentiate the situation in this case from that last above stated, is to reach a harsh and unnatural result which Congress nowhere has specifically indicated should be productive of taxable gain. The capital nature of the transaction makes it quite clear that an attempt by Congress to tax income out of the situation described would be unconstitutional and void.

It was entirely erroneous for the Commissioner to attempt to make the condemnation and assessment separate and distinct events. The transaction was a single one between the Petitioner on one side and the city of Los Angeles on the other, and consisted of a taking of part of his lot for a highway and the assessing against him of his share of the costs of acquiring the land and building the street, the assessment being an integral part of the plan from the start, and not susceptible of divorcement through any act of the city officials.

In *Carrano v. Commissioner,* 70 Fed. (2d) 319, the United States Circuit Court of Appeals for the Second Circuit considered a case involving circumstances similar to those in this case, *except that there the award was greater than the benefit assessments which were paid out of the award.* The court recognized the singleness of the condemnation and the benefit assessments, and held that

they occurred simultaneously and must be considered together, saying:

> "In this instance the 'gain' in dispute could arise only on the hypothesis that so much of the award as paid the assessment was received before the assessment itself was paid. This was demonstrably not the case; it was received at the same time. Thus it does not affirmatively appear to be a taxable 'gain' at all, and the taxpayer wins. Moreover, this is the direct and natural way to look at the transaction. The taxpayer has 'gained' only what he has received above his cost; so far as his award has been cancelled by the assessment, it is not a 'gain' at all, it is instantly absorbed by a new cost which arises and is paid without allowing him even a momentary possession of the 'gain'."

For other cases in which income was not recognized because contractually tied up with a disbursement, see *Mellon v. U. S.*, 279 Fed. 910, affirmed 281 Fed. 645, and *U. S. v. Davison*, 9 Fed. (2d) 1022, Cert. denied 271 U. S. 670, where dividends were not taxed but were treated as stock dividends because of an agreement to apply them to stock subscriptions. In *Irving v. U. S.*, 44 Fed. (2d) 246 (Court of Claims) the above cases were followed, even though dividend checks were actually issued.

An example of how the Supreme Court looks at an entire transaction and will not permit it to be torn apart to get a highly technical result, is shown in *Bowers v. Kerbaugh-Empire Co.*, 271 U. S. 170. There the taxpayer repaid a loan, at a large apparent profit, with depreciated currency. The Supreme Court decided that

there was no taxable income because the borrowed money had been lost in business and the entire venture resulted in a loss rather than a profit.

In *Burnet v. Sanford & Brooks Company,* 282 U. S. 359, the Supreme Court took within its view, circumstances occurring over a period of years, in determining whether money received in 1920 was income. The court held that the receipt in 1920 was not income, as it merely reimbursed the taxpayer for losses incurred in earlier years, even though those losses had been deducted in the earlier years' tax returns.

See, also, *Drier v. Helvering,* 72 Fed. (2d) 76, where interest received on a claim against Germany was held not to be income, for the reason that the principal and interest received did not exceed the cost of the stock taken by Germany during the war.

The entire transaction was involuntary so far as Petitioner was concerned, and both aspects of it were carried out under the same law, the *"Street Opening Act of 1903" of California, Stats.* 1903, *page* 376. The Act provides for the bringing of a suit to condemn property for public improvements, for the entry of an interlocutory decree fixing the amount of the awards for the land taken, the assessment by the street commissioner of the amount necessary to pay for the land taken and the cost of the opening. The Act provides that after the assessments are collected and the awards paid therefrom, a final judgment will be entered directing that the interlocutory judgment be satisfied, and condemning the lands described in the complaint. The Act provides that the property owner may have the award offset against the assessment.

It is clear from the above analysis of the Street Opening Act of 1903, that:

1. The award and the assessment are part of the same transaction.
2. The award is paid out of the assessment.
3. Petitioner, in effect, paid his own award.
4. Petitioner in substance and effect gave up 20 per cent of his land and paid $15,164.60 to have a street cut through his lot.
5. The sum of $23,549 was not *severed from* Petitioner's land and paid to and *received* by Petitioner for his own *seperate* use, benefit and *disposal,* and is not income. See *Eisner v. Macomber,* 252 U. S. 189.

The award does not satisfy the definition of income laid down by the Supreme Court in *Eisner v. Macomber, supra,* page 207:

> "Income may be defined as the gain derived *from* capital, from labor, or from both combined."
>
> "Brief as it (the above definition of income) is, it indicates the characteristic and distinguishing attribute of income essential for a correct solution of the present controversy. The Government, although basing its argument upon the definition as quoted, placed chief emphasis upon the word 'gain,' which was extended to include a variety of meanings; while the significance of the next three words was either over-

looked or misconceived. *'Derived—from—capital'*; —'the *gain—derived—from—capital,'* etc. Here we have the essential matter; *not* a gain *accruing to* capital, not a *growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value, *proceeding from* the property, *severed from* the capital however invested or employed, and *coming in,* being *'derived'*,—that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal;—*that* is income derived from property. Nothing else answers the description." (Emphasis supplied by the Court.)

Income is generally realized either in money or property. In the instant case, so far as money is concerned, it is plain that the Petitioner did not actually come into possession of any money. All that he received was a credit upon the assessment which he was obligated to pay to the City of Los Angeles, by reason of its procedure against his property for the acquisition of a highway across it. If by this credit he received money, then he paid that money to himself, and paid $15,164.60, in addition, to others.

So far as property is concerned, Petitioner did not receive a new piece of property which might be income to the extent of its value. There may have been an increase in the value of his old property, but he did not realize upon such increase by a sale, and "a growth or increment of value in the investment" is not income until realization. The new property he did receive, the easement to have

a street maintained through his lot, was purchased with the property he gave up and fresh money put up by him in the amount of $15,164.60.

Therefore, Petitioner did not realize income, either in cash or in property. By so holding, the Court will not be permitting income to escape taxation. The award will reduce Petitioner's cost of the lot. His total investment in the land, as distinguished from the buildings was, at the end of 1929, $59,713.60 ($21,000 plus $38,713.60). He has recovered part of his capital, namely, the award of $23,549. Hence, his net cost is $36,164.60. When he sells the lot his profit will be greater, or his loss smaller, by $23,549, than it would have been if he had not received the award.

Any *theory* which would require Petitioner to pay a tax on a profit from this transaction would be subject to the criticism that it was unreasonable, unjust, and arbitrary. It would shock the conscience of the man in the street, and would violate his conception of fairness. The award and the assessment were inseparable parts of the same transaction and the net result was an additional investment rather than the severance of any profit.

Petitioner did not come out of the transaction with anything that he could pay the proposed income tax with. Any tax he would pay would have to come out of his other property, if any, and would be a tax, not on income, but on property. He surely did not receive any income.

II.

The Cost of and the Profit on the Strip Taken Should Be Increased by $7,742.72, Which Is 20 Per Cent of the Assessment Paid for the Street Improvement.

Should the Court rule that taxable income was realized by Petitioner, then it will be necessary to determine the amount of such income.

The lot cost $21,000 and 20 per cent of it was taken. Before the condemnation became final, however, an assessment of $38,713.60 was levied on Petitioner's lot. At least 20 per cent of this should be allocated to the strip taken. This was not done by the Respondent. The cost of the strip should be increased $7,742.72, and the profit should be reduced by the same amount.

This conclusion seems well supported by the decision of the United States Circuit Court of Appeals for the Second Circuit, in the case of *Carrano v. Commissioner,* 70 Fed. (2d) 319, in which the Court added the entire assessment to the cost of the land taken. The Solicitor General has announced that no petition for Writ of *Certiorari* will be filed in that case. (Page 233, *Prentice Hall 1934 Federal Tax Service.*)

III.

If the Condemnation Award and the Benefit Assessments Are Separable, and an Apparent Profit Was Realized, Then Such Profit Is Non-taxable Under Section 112(f) of the Revenue Act of 1928.

In so far as time is concerned, the award and the assessment must have had one of the following relationships:

1. The assessment was first (in which event the cost of the strip taken should be increased and the profit decreased by at least $7,742.72).

2. They were simultaneous (in which event there was no closed transaction, but only an additional investment of $15,164.60).

3. The award was first (in which event it was expended in the assessment, which renders the profit non-taxable as will be shown hereinafter.)

Whatever the order of accrual, there can be no doubt but that the award went to help pay the assessment.

What did Petitioner receive by paying the assessment? He received real estate; he received real estate which became a part of or related to the real estate retained; he received real estate which helped produce rental income in place of the income producing real estate he gave up; he received other property *similar or related in service or use to the property given up.*

The nature of Petitioner's interest in the street is stated in 29 *Corpus Juris* 547, as follows:

> "An abutting owner has two distinct kinds of rights in a highway, a public right which he enjoys

in common with all other citizens, and certain private rights which arise from his ownership of property contiguous to the highway, and which are not common to the public generally; and this regardless of whether the fee of the highway is in him or not. These rights are property of which he may not be deprived without his consent, except upon full compensation and by due process of law. They include the easement of access, and of light and air, the right to lateral support, and the right to have the highway kept open as a thoroughfare to the whole community for the purpose of travel."

See, also:

44 *Corpus Juris* 942;

Williams v. Los Angeles Railway Company, 150 Cal. 592; 89 Pac. 330.

Such rights as access, light, air, lateral support and the right to have the highway kept open, are easements or incorporeal things real and are real estate. (*Tiffany Real Property,* page 8, page 677, page 700; *Williams v. Los Angeles Railway Co., supra.*)

What did Petitioner give up in exchange for the award? He gave an easement for the public to have a right of way through his land. He retained the fee of the land. (*People v. Marin County,* 103 Cal. 223; 37 Pac. 203; *Levee Dist. No. 9 v. Farmer,* 101 Cal. 178; 35 Pac. 569; 13 *Cal. Jur.* 364; 29 *Corpus Juris* 540.)

Petitioner then gave up an easement, and acquired an easement. The easement he gave up was to allow the public to cross over his lot. The principal easement he acquired was the right to have the thoroughfare main-

tained alongside his remaining property. (29 *Corpus Juris* 547.) The easement acquired is "other property", but is similar or related to the easement given up.

Both easements had to do with his lot, as a whole. Both helped produce rental income. Both were supplements of the same parcels of property, namely, the remaining pieces of the original lot.

Petitioner gave up the right to derive rental income from the central portion of his lot. He acquired a right which presumably increased the rental income of the two remaining portions of the lot.

The two easements are similar because both are real estate and both are rent producing properties.

The two easements are related because they both supplement the remaining parcels; both have to do with the rental income of the entire lot.

In considering whether the award was invested in the acquisition of "other property similar or related in service or use" to the property taken away, it is urged that the Court take as liberal a view of the law and facts as possible. There are a number of reasons for this.

In the first place, Section 112(f) was inserted in the law to give relief to taxpayers who have realized profits involuntarily, through the action of a governmental body or natural force. The section should therefore be so construed liberally lest the beneficent intent of Congress might be thwarted. See *U. S. v. United Shoe Machinery Co.*, 264 Fed. 138; 57 Corpus Juris 1107. Certainly the case at bar is within the reason of the statute, and should therefore be given the benefit of the statute. 57 Corpus Juris 1109. The Board itself has recognized that the

sections dealing with involuntary conversions are remedial provisions. In *Washington Market Co.,* 25 B. T. A. 576, 584, the Board said:

> "As we view it, Section 203(b) (5) (Revenue Act of 1924) is a special or relief provision designed to prevent an inequitable incidence of taxation, perhaps to prevent the very action that is here proposed."

In another case the Board correctly said:

> ". . . it is from results rather than methods that the allowance or disallowance of deductions under Section 234(a) (14) (Revenue Act of 1921) must be determined."
>
> *Excelsior-Leader Laundry Co.,* 8 B. T. A. 183, 189.

Certainly Congress would wish to prevent the inequity of the tax proposed on Petitioner under the circumstances of this case. He has suffered too much, financially, in the transaction already. He is already "out" $15,164.60 cash plus 20 per cent of his land and buildings, on this involuntary exaction.

In the second place, it is urged that the Court be liberal in considering whether there was a reinvestment satisfying the statute, because Petitioner did not have a chance to exercise his judgment in making the reinvestment. If the City of Los Angeles had paid him $23,549 without charging him a greater sum, or any sum at all, he could have purchased "other property similar or related in service or use" beyond the shadow of a doubt. He could have purchased another lot, which, presumably, would have satisfied the statute. But the City required Petitioner, whether he thought it was a good investment or not, or

whether he had the money or not, or whether he thought it "other property similar or related in service or use," to buy the "street" through his lot.

Finally, in considering this question there should be applied the familiar principle that all doubts concerning the applicability of a taxing statute should be construed strictly against the Government and in favor of the taxpayer.

Gould v. Gould, 245 U. S. 151.

Since all of the award was reinvested in other similar or related property, none of the profit is taxable. This does not mean that any taxable income will escape tax. The award received will reduce Petitioner's cost and his profit on the subsequent sale will be correspondingly increased, or his loss decreased.

CONCLUSION.

The law and facts of the case warrant the following conclusions:

1. The award and the assessment both arose under one statute, one proceeding, one ordinance; they are parts of one transaction.
2. The substance of the transaction was an investment by Petitioner; not a closed transaction, but one side only.
3. Petitioner did not derive a clear, detached, enjoyable gain from the property in the constitutional sense.

4. If any gain is recognized it should be reduced by the additional cost of the strip taken, represented by at least 20 per cent of the assessment.
5. Petitioner expended the entire award in the acquisition of other property similar or related in service or use to the property taken.
6. In granting any of Petitioner's contentions, no income will escape taxation—it will merely be postponed until there really is taxable income.
7. Congress wished to prevent hardship in the case of involuntary conversions, and the law should be liberally interpreted or a gross injustice will occur in this case.
8. This transaction comes within the spirit and the letter of *Section 112(f)*.
9. The order of the Board of Tax Appeals should be reversed.

Respectfully submitted,

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January, 1935.

APPENDIX.

THE FOLLOWING EXCERPTS FROM THE STREET OPENING ACT OF 1903, CALIFORNIA STATS. 1903, P. 376, APPROVED MARCH 24, 1903, AS AMENDED, ARE PERTINENT TO THIS CASE.

"Order for improvement.

"Sec. 5. Having acquired jurisdiction, the city council, shall, by ordinance, order said improvement to be made, and direct an action to be brought by the city attorney, in the proper superior court, in the name of the municipality, for the condemnation of the property necessary or convenient to be taken therefor. Such ordinance need not describe the property to be taken, nor the assessment district, but may refer to the ordinance of intention for all particulars."

"Assessment of damages. Findings.

"Sec. 10. For the purpose of assessing the compensation and damages, the right thereto shall be deemed to have accrued at the date of the order appointing referees or of the order setting the cause for trial, as the case may be, and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected, in all cases where such damages are allowed by the provisions of this act. No improvements placed upon the property proposed to be taken, subsequent to the date of the publishing of the notice of the passage of the ordinance of intention, shall be included in the assessment of compensation or damages.

"The referees, or court, or jury, as the case may be, shall find separately:

"First. The value of each parcel of property sought to be condemned, and all improvements thereon pertaining to the realty, and of each separate estate or interest therein;

"Second. If any parcel of property sought to be condemned is only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, and to each separate estate or interest therein, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff. Such damages must be fixed irrespective of any benefit from such improvement. (Amendment approved April 21, 1909, Stats. 1909, p. 1038.)"

"Confirmation of report. Interlocutory judgment. Compensation of referees.

"Sec. 12. Upon the confirmation of the report of the referees, or receipt of the verdict of the jury, or the filing of the findings of the court, the court shall make and enter an interlocutory judgment in accordance with such report, verdict or findings, adjudging that upon payment to the respective parties, or into court for their benefit, of the several amounts found due them as compensation, and of the cost allowed to them, the property involved in the action shall be condemned to the use of the plaintiff, and dedicated to the use specified in the complaint. The court shall allow to the referees, as costs to be paid by the plaintiff, a reasonable compensation for their services, the amount of which compensation shall be fixed by the court upon the hearing of the report, and

their necessary expenses. (Amendment approved April 21, 1909, Stats. 1909, p. 1040.)"

"Delivery of diagram. Completed assessment.

"Sec. 16. The city engineer shall deliver said diagram to the street superintendent and shall endorse thereon the date of such delivery. The street superintendent upon receiving the said diagram shall proceed to assess the total expenses of the proposed improvement (first deducting from such total expenses such percentage thereof, if any, as the city council may have declared by the ordinance of intention that the city shall pay) upon and against the lands, including the property of any railroad or street railroad, within said assessment district, except the land to be taken for such improvement, in proportion to the benefits to be derived from said improvement. The street superintendent shall complete said assessment within sixty days after the receipt by him of said diagram; provided, however, that the city council may by order extend the time for completing said assessment for a period not exceeding ninety days additional. The total expense of the improvements so to be assessed shall include the amounts awarded to the defendants by the interlocutory judgment in the action for condemnation, together with their costs, the compensation and expenses of the referees, as allowed by the court, and all other costs of the plaintiff in such action, the expenses of making the assessment, and all expenses necessarily incurred by said city, in connection with the proposed improvement, for the publication of ordinances, posting and publication of notices, for maps, diagrams, plans, surveys, searches and certificates of title to the property to be taken, and all other matters incident thereto. (Amendment approved June 10, 1913, Stats. 1913, p. 433. In effect August 10, 1913.)

"This section was also amended April 21, 1909, Stats. 1909, p. 1040."

"Record of assessment.

"Sec. 20. The clerk of the council shall thereupon deliver to the street superintendent the assessment as confirmed by the city council, with his certificate of such confirmation, and of the date thereof. The street superintendent shall thereupon record such assessment and diagram in his office, in a suitable book to be kept for that purpose, and append thereto his certificate of the date of such recording, and such record shall be the assessment roll. From the date of such recording all persons shall be deemed to have notice of the contents of such assessment roll. Immediately upon such recording, the several assessments contained in such assessment roll shall become due and payable, and each of such assessments shall be a lien upon the property against which it is made."

"Payment by offset.

"Sec. 21. The owner of any property assessed, who is entitled to compensation under the award made by the interlocutory judgment, may, at any time after such assessment becomes payable, and before the sale of said property for nonpayment thereof, as hereinafter provided, demand of the street superintendent that such assessment, or any number of such assessments, be offset against the amount to which he is entitled under said judgment. Thereupon, if said amount is equal to or greater than such assessments, including any penalties and costs due thereon, the assessments shall be marked 'Paid by offset'; and if the said amount is less than the assessments, and any penalties and costs due thereon, the person demanding such offset shall at the same time pay the difference to

the street superintendent in money, and the assessments shall, on such payment, be marked paid, the entry showing what part thereof is paid by offset and what part in money. In either case, as a condition of the offset, such person must execute to the city and deliver to the street superintendent duplicate receipts for such part of the amount due him under said interlocutory judgment as is offset against such assessments, penalties, and costs. One of said duplicate receipts shall be filed by the street superintendent in his office, the other shall be filed with the clerk of the superior court, and on such filing, the city shall be entitled to a satisfaction *pro tanto* of said interlocutory judgment."

"Notice to pay. Delinquency.

"Sec. 22. The street superintendent shall, upon the recording of said assessment, give notice, by publication for ten days in a daily newspaper, published and circulated in such municipality, or by three successive insertions in a weekly newspaper, so published and so circulated, that said assessment has been recorded in his office, and that all sums assessed therein are due and payable immediately, and that the payment of the said sums is to be made to him within thirty days after the date of the first publication, which date shall be stated in the notice. Said notice shall also contain a statement that all assessments not paid before the expiration of said thirty days will become delinquent, and that thereupon five per cent upon the amount of each such assessment will be added thereto. When payment for any assessment is made, the street superintendent shall mark opposite such assessment, the word, 'paid,' the date of payment, and the name of the person by or for whom the same is paid, and shall, if so

requested, give receipt therefor. On the expiration of said period of thirty days, all assessments then unpaid shall become delinquent, and the street superintendent shall certify such fact at the foot of said assessment roll, and mark each such assessment 'delinquent,' and add five per cent to the amount of each assessment delinquent."

"Receipts paid into special fund.

"Sec. 30. The street superintendent shall from time to time pay over to the city treasurer all moneys collected by him on account of any assessment made under the provisions of this act. The city treasurer shall on receipt thereof place the same in a special fund, designating such fund by the name of the improvement for which the assessment was made. The city council shall on or before the time when said assessments become delinquent, cause to be transferred from the general or other appropriate fund of the city to said special fund the percentage of the total expense of such improvement to be paid by the city as provided in the ordinance of intention. (Amendment approved June 10, 1913, Stats. 1913, p. 436. In effect August 10, 1913.)"

"Payment of awards. Final judgment.

"Sec. 31. As soon as there is sufficient money in the hands of the city treasurer, in the special fund devoted to the proposed improvement, to pay the amounts awarded to the defendants by the interlocutory judgment in the action of condemnation, or such parts thereof as have not been paid by offset against assessments, as hereinbefore provided, the said amounts shall be paid to the parties entitled thereto, or into court for their benefit. On satisfactory proof being made to the court of payment of the amounts awarded by the interlocutory judgment to the

respective parties entitled thereto, or into court for their benefit, it shall direct the interlocutory judgment to be satisfied, and shall make and enter a final judgment, condemning the lands described in the complaint to the use of the plaintiff for the purposes specified in such complaint."

"Proceedings in case of a deficiency.

"Sec. 32. In case of a deficiency in the fund for such improvement, the city council, in its discretion, may provide for such deficiency by an appropriation out of the general fund of the treasury, or by ordering a supplementary assessment to be made by the street superintendent upon the property in said assessment district in the same manner and form, and subject to the same procedure as the original assessment, and in the last named case, in order to avoid delay, the city council may advance such deficiency out of the city treasury and reimburse the treasury from the collections under such supplementary assessment. In case of a surplus in the fund for such improvement, the city council may order such surplus refunded pro rata to the parties who paid the assessments."